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FILED
MAR 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT
OF THE UNITED STATES

_____TERM, 19____

No.

CARL LEE GALLO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

I. Whether the District Court violated Petitioner's Fifth Amendment Right to due process by failing to grant his Motion to Withdraw his Plea of Guilty prior to the imposition of sentence.

PARTIES TO THIS PROCEEDING IN THE COURT BELOW

This action, as filed in the United States Court of Appeals for the Fourth Circuit, was styled United States of America v. Carl Lee Gallo, at No. 85-5078.

The action in the United States District Court for the Northern District of West Virginia was styled United States of America v. Carl Lee Gallo; Johnnie J. Gallo, a/k/a Brother John; John Edward Wilson; Freda Virginia Gallo Wilson; Rosamaria Lynn Scolopio; Curtis C. Eazor; Joseph A, Massaro; Robert Edward Student, a/k/a/ Crazy Bob; George W. Schell; Ronald Lauterio; Delmus L. Foster; Thomas R. Stevens, a/k/a Hyper; Samuel T. Iaquinta, a/k/a Sammy I; Michael Louis Gallo; John B. Cain, Jr., a/k/a John Boy; David Lee Stout; Earl Adam Smith, a/k/a Pineapple; John S. Folio, a/k/a Sam; Velma E. Shine; Leonard V. Courtney; Richard

D. Dunlap; Frank W. Maley, Jr.; Carol D. Sprouse; Danny Morgan; Dean Fragale; Harry Joseph Stafford; Robe' A. Jackson; Pamela L. Burner; Pamela L. Morrison; Fred Ford; Timothy R. Mirarchi; Kimberly Reneve Pumphrey Lindsey; Anthony Alvino; Robert O. Fitz; Diana V. Gray; James G. Pratillo; John W. Adams, a/k/a Tree; Kenneth Bruce; and Rick Piacenti, at CR-84-00005-E(K)-01-39.

Following their conviction by jury, four of the Petitioner's co-defendants filed a separate appeal to the United States Court of Appeals for the Fourth Circuit in an action styled United States of America v. George W. Schell; John B. Cain, Jr, a/k/a/ John Boy; Thomas R. Stevens, a/k/a Hyper; and Freda Virginia Gallo Wilson, at No 84-5337. That case was argued before the Fourth Circuit on July 15, 1985. The Court affirmed the convictions of George W. Schell and Thomas R. Stevens; the

convictions of John B. Cain, Jr., and Freda Virginia Gallo Wilson were reversed in an opinion handed down October 16, 1985, at 775 F.2d 559 (4th Cir. 1985).

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The United States Court of Appeals for the Fourth Circuit issued an Opinion and Judgment on January 9, 1986. A copy of the Opinion is contained in the Appendix at pps. 31-33. A copy of the Judgment is contained in the Appendix at p. 34.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 9, 1986. Petitioner did not submit a Petition for Rehearing.

The jurisdiction of the Supreme Court of the United States in invoked pursuant to Title 28 United States Code Section 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer to a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

PROCEDURAL

On February 2, 1985 the Grand Jury for the Northern District of West Virginia indicted the Petitioner, Carl Lee Gallo, and 38 other individuals in a 344-count indictment charging various violations of the federal drug and racketeering laws. Indicted with the Petitioner was the mother of his now three-year son, Pamela Lynn Morrison.

The Petitioner was number one in the indictment, and charged in 99 counts; Ms. Morrison was number 29 in the indictment, and charged in 15 counts. In addition to the charges against the Petitioner the Government sought to forfeit certain realty and a business owned by the Petitioner.

The Petitioner and Ms. Morrison, like the majority of the defendants in the indictment, did not go to trial but negotiatied plea bargains with the United States Attorney. The Petitioner and

Ms. Morrison were represented by the same attorney and their plea bargains were negotiated in tandem.

Petitioner's plea agreement was accepted by the District Court after colloquy on April 30, 1984. Ms. Morrison's agreement was accepted by the District Court after colloquy on April 30, 1984.

The District Court imposed sentence upon the Petitioner and Ms. Morrison on March 5, 1985. Ms. Morrison was sentenced first. There is no disagreement that at that time the United States Attorney did not fulfill that portion of the plea agreement which required him to inform the court that the government did not oppose probation for Ms. Morrison. The Court sentenced Ms. Morrison to 3 years imprisonment with a recommendation of parole after one year.

Following the sentencing of Ms Morrison, the Petitioner sought to withdraw his plea claiming the United States Attorney had breached the plea

agreement and, later, for a hearing to expand on the reasons for the withdrawal motion. The Court refused to allow the Petitioner to withdraw his plea and sentenced him to 30 years imprisonment, $50,000.00 fine and a term of special parole for life. He has been in prison since.

The Petitioner immediately appealed the refusal of the District Court to withdraw his plea. Ms. Morrison did not appeal. The United States Court of Appeals for the Fourth Circuit heard argument on the appeal on November 8, 1985, and affirmed the decision of the District Court in an opinion dated January 9, 1986. The Petitioner did not seek rehearing before the court en banc.

This petition followed.

BACKGROUND

The plea negotiations between the United States Attorney and counsel for the Petitioner lasted several weeks. Besides the obvious questions

of the charges to be pled to and the cap on the potential sentence, the issue of the proposed forfeiture of Petitioner's property had to be resolved, as well.

By the time the date had arrived for Petitioner's trial the parties had agreed as to the charges to which he would plead, as well as the cap. Issues associated with the property had yet to be resolved, but the parties had agreed in principle to the broad outlines of the deal. In reliance on this commitment from the United States, petitioner provided over 40 hours of cooperative debriefing and passed a lie detector test. Both parties agreed to continue negotiating during the interval between acceptance of the plea and sentencing. The plea agreement eventually reached was breached by the Government in 4 ways: 1.) The Petitioner owned a corporation in Clarksburg, West Virginia, trading under the name

of 'United Taxi.' Prior to the indictment the Petitioner had sold his interest in the business to Rosamaria Scolopio, a co-defendant. By resolution of the corporate board the selling price of the corporation was to be paid out of the income generated by the business and paid into a trust fund established in the name of Anthony Lee Gallo, minor son of Petitioner. Attorneys for Ms. Scolapio, pursuant to her plea bargain had agreed to the forfeiture of United Taxi pursuant to 18 United States Code Section 1962. The United States Attorney by Assistant United States Attorney Martin Sheehan recognized the infant child of the Petitioner as a third party purchaser for value and agreed to honor the terms of the corporate resolution and agreed upon the amount due the the child was $25,000.00.

The morning Petitioner was to be sentenced, Mr. Sheehan informed counsel for Petitioner that

the Government intended to repudiate the agreement as to Anthony Lee Gallo.

2.) Throughout the plea negotiations, the United States Attorney and members of his staff repeatedly stressed to counsel and to Petitioner and Miss Morrison that the sentencing court strongly encouraged and rewarded cooperation with the government. As a consequence of this, counsel asked certain of the agents on the case, particularly, Larry Mincks, should he find Petitioner and Miss Morrison's cooperation to be of sufficient calibre to justify it, to speak of the cooperation of Petitioner and Miss Morrison to the court at the time of sentencing. Following debriefing, Mr. Mincks repeatedly assured Petitioner, Miss Morrison and counsel that he would speak on Petitioner, and Ms. Morrison's behalf at sentencing. It is undisputed that he did not do this.

3.) The United States Attorney agreed to detail in writing the extent of the cooperation by Petitioner and Ms. Morrison and deliver that writing to the court for inclusion in the pre-sentence report for use at the time of sentencing. The United States Attorney did so for the Petitioner, but did not do so for Miss Morrison, despite the fact that her cooperation was considered to be "extraordinary" by Agent Mincks.

4.) At the time of the indictment the Government seized Petitioner's family home. At that time the house secured a loan to United Taxi. At the time of the seizure of United Taxi the Government indicated that it would continue to pay on the loan to the corporation. Three months before United Taxi entered voluntary bankruptcy the Government ceased making payments on the loan. The Government did not inform the Gallo family, and, as a result, when the property was finally returned

to the Petitioner's family the bank instituted foreclosure proceedings.

5.) Finally, it is undisputed that the terms of Ms. Morrison's plea bargain were part of the very inducement offered by the Government to the Petitioner to enter his plea. From the outset of the negotiations, the Petitioner represented to the United States Attorney that Ms. Morrison's welfare, and that of their infant son, was his primary consideration. Petitioner's concern was made known to the sentencing court before his plea, as well. The promise of the United States Attorney to orally represent to the Court at the time of Ms. Morrison's sentencing that the Government did not oppose probation for Ms. Morrison and to say so in writing in her presentence report, was incorporated in Ms. Morrison plea letter and was, in fact, the sine qua non for the Petitioner to enter any plea whatsoever.

When counsel for Petitioner made the motion to withdraw the plea at the time of sentencing the District Court replied that the motion would be denied "as long as the government complies with the agreement in full," (Appendix, p. 14A). Counsel argued that the court did not yet know whether in fact the government had complied with the plea agreement. Nonetheless, the motion was denied without hearing or argument.

Subsequent to the filing of the appeal the Petitioner sought permission from both the District Court and the Fourth Circuit Court of Appeals to make the record he was denied the chance to make at the time of sentencing. Both courts denied leave to do so.

The Fourth Circuit, in an unpublished opinion, held that if any one had a right to raise the breach of Ms. Morrison's plea agreement it was Ms. Morrison, and Ms. Morrison alone. Further, since

the Petitioner did not make of record all the reasons he sought to withdraw his plea, he could not raise those issues for the first time on appeal.

In its opinion the Fourth Circuit did not address the failure of due process inherent in both the District Court's refusal, and the Circuit's as well, to allow the Petitioner to make the record of the Government's breach.

REASON RELIED UPON FOR THE ALLOWANCE OF THE WRIT

THE DISTRICT COURT VIOLATED PETITIONER'S FIFTH AMENDMENT RIGHT TO DUE PROCESS BY FAILING TO GRANT HIS MOTION TO WITHDRAW HIS PLEA OF GUILTY, PRIOR TO THE IMPOSITION OF SENTENCE.

It is a well settled principle of this Court that a failure of due process occurs when the government breaches its promises with respect to an executed plea agreement and the defendant's conviction is allowed to stand. Mabry v. Johnson, __U.S.__, 104 S. Ct. 2543 (1984). "?W?hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Santobello v. New York, 404 U.S. 257, 262 (1971).

The decision in the instant case is such a departure from these well-established principles as

to call for an exercise of this Court's power of supervision.

Petitioner presents two issues of due process violations. One is an issue of first impression: that is, whether a breach of a co-defendant's plea agreement can be grounds for withdrawal of a plea, when the co-defendant's plea agreement was part of the bargained for consideration for Petitioner's plea. The second is whether Petitioner can be denied the opportunity to present to the district court other breaches of the government's commitments to him, which commitments were material to inducing the Petitioner to plead.

As the Fourth Circuit itself has recognized, inherent in the constitutional right to due process is the right of the Defendant to be treated with fundamental fairness throughout the plea bargaining process. Cooper v. United States, 594 F.2d 12 (1979). Absolutely basic to such fairness is the

notion that the government must keep the promises it gave to induce a defendant to enter a guilty plea. Mabry v. Johnson, supra, 104 S. Ct. at 2547.

However, the Fourth Circuit has taken the position as to the Petitioner that he is not entitled to raise the breach of Ms. Morrison's plea agreement even if that agreement was in fact part of the consideration for the Petitioner to plead guilty. The Court cited no authority for this extraordinary position, nor gave any rationale.

Furthermore, the Court did not address the equally egregious failure of due process that occurred when the Petitioner sought to make of record before the District court all the other breaches committed by the Government, although principal among those was Ms. Morrison's sentence. The transcript of Petitioner's sentencing makes unmistakably clear that the Trial Court intended to sentence the Petitioner on that day and would

brook no interference[1] with those plans. While emotions were very high that day, (see: Transcript of Carl Lee Gallo Sentencing Hearing, pp. 510-520 A,) tempers had surely cooled by the time Petitioner had submitted a written motion to the District Court (Appendix, 494-497A). Nonetheless he was denied the opportunity to make the record.

Petitioner was thus placed in a 'Catch-22' situation: i.e. if the Government breached Petitioner was entitled to withdraw his plea. On the other hand he was not allowed to make a record of the various breaches and consequently not allowed to withdraw his plea.

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1. THE COURT: I will take a 15 minute break here and in 15 minutes I am going to sentence whether he wants to be sentenced or not." Appendix, p. 507 A.

We take this circumstance to be anathema to the due process notion of fundamental fairness. This is precisely what this Court has repeatedly insisted should not be done if the plea bargaining process is to function properly.

However, even on the very limited state of the record the Petitioner was allowed to make, he is still entitled to withdraw his plea.

This Court gave formal approval to the plea bargaining system in Santobello v. New York, supra, but did not enunciate the substantive principles that should control the process. The basic consideration according to the Court was that the system should be fundamentally fair to the Defendant. Santobello, supra, 404 U.S. at 261. The Santobello court spoke of the process in terms like 'bargained', 'negotiated' and 'breached'. Trial courts and courts of appeal have thus drawn heavily on the body of contract

law for specific guidelines and remedies in dealing with problems of the plea bargaining system.

The Fourth Circuit itself has not, however, limited the constitutional right of 'fairness' in the plea bargaining system solely to expectations arising from principles of contract law, but has recognized it to be somewhat wider in scope and unfettered by certain formalities inherent in the commercial context. Cooper v. United States, supra, 594 F. 2d at 16-17; United States v. CFW Construction Co., Inc., 583 F. Supp 197, affirmed 749 F. 2d 33 (4th Cir. 1984). But even without this broader scope given to a Defendant, this Petitioner is entitled to withdraw his plea.

It is undisputed that the terms of Ms. Morrison's plea agreement were of paramount consideration to the Petitioner. Ms. Morrison, as a relatively minor figure in the indictment, had little in her own right with which to bargain. The

Petitioner, as the alleged 'kingpin', had a great deal more leverage in terms of potential cooperation. From the beginning of the negotiations, it was clear to both sides that absent a plea agreement for Ms. Morrison that was satisfactory to the Petitioner, he would not enter into his own plea agreement. Thus, under classic contract law the terms of Ms. Morrison's plea agreement were part of the consideration for Petitioner's plea. It is certainly a familiar situation in the commercial context for an executed contract to constitute valid consideration for a second contract.

For the Court of Appeals to take the position that the two plea agreements became antiseptically separate and distinct, following acceptance of the pleas by the district court, is to ignore the reality of the negotiations that produced them.

Under a contract theory, Ms. Morrison became a third-party donee beneficiary of the contract between the Petitioner and the Government. Realistically, it was the Petitioner's cooperation that the Government sought and got, over 40 hours worth. While Ms. Morrison could have asserted the breach of her plea agreement, the existence of such a right in her did not extinguish any rights in Petitioner. It is a well-recognized principle of contract law that even if the beneficiary has a right to proceed against the promisor, the promisee has a right, independent of the beneficiary, to enforce the contract. 4 Corbin, Contracts 238-245 (1951). It is equally well-settled that action by the beneficiary is not a prerequisite to action on the part of the promisee. Id.

Under any theory of contract law Petitioner has met the burden necessary to be entitled to withdraw his plea under Rule 32 (d) of the Federal

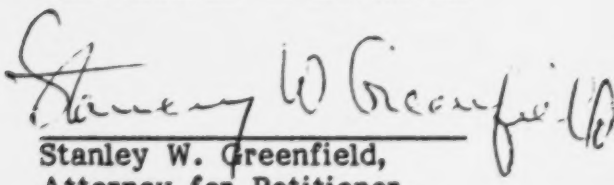
Rules of Criminal Procedure. Due process mandates that the government not be allowed to take advantage of its failure to deal fairly with the Petitioner, once he had fairly dealt with the Government.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that this Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted:

GREENFIELD & MURTAGH



Stanley W. Greenfield,
Attorney for Petitioner,
Carl Lee Gallo

CERTIFICATE OF SERVICE

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF ALLEGHENY)

I hereby certify that on the 10th day of March, 1986, three (3) true and correct copies of the foregoing PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, were served on each of the individuals and in the manner indicated below, which service satisfies the requirements of Rule 28 of the Untied States Supreme Court Rules.

SERVICE BY FIRST CLASS, UNITED STATES MAIL, POSTAGE PREPAID:

1. Rex E. Lee
SOLICITOR GENERAL
United States Department of Justice
Room 5143
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Washington, D.C. 20530

2. William A. Kolibash, Esquire
United States Attorney
Northern District of West Virginia
United States Courthouse and
Postoffice
Wheeling, WV

GREENFIELD & MURTAGH

Stanley W. Greenfield,
Attorney for Petitioner
Carl Lee Gallo

SWORN to and subscribed before me this

10th day of March, 1986.

Jane C. Dindinger
Notary Public

My Commission Expires:

JANE C. DINDINGER, NOTARY PUBLIC
PITTSBURGH, ALLEGHENY COUNTY
MY COMMISSION EXPIRES JUNE 7, 1988
Member, Pennsylvania Association of Notaries

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-5078

United States of America
Appellee,

versus

Carl Lee Gallo,
Appellant.

Appeal from the United States District Court for the Northern District of West Virginia, at Clarksburg.
William M. Kidd, District Judge.
(CR 84-00005-E(K)-01)

Argued November 8, 1985

Before WINTER, Chief Judge, SPROUSE, Circuit Judge, and MICHAEL, United States District Judge for the Western District of Virginia, sitting by Designation

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Decided: January 9, 1986

PER CURIAM:

Carl lee Gallo was convicted on pleas of guilty to numerous RICO, conspiracy, narcotics, firearm and income tax offenses, as was a non-appealing co-defendant who was his common-law wife and who had borne him a son. He appeals, contending that the district court erred in denying his pre-sentencing motion to withdraw his pleas.

Before us, Gallo contends that he was entitled to withdraw his pleas because the United States had failed to live up to its agreements to avoid incarceration for his co-defendant and to permit the establishment of a trust to provide support for his infant son. This contention, however, was not advanced in the district court. Gallo's motion to withdraw his pleas was made immediately after sentencing of his co-defendant to a terms of three years. Even now Gallo proffers no real proof that the government breached his

plea agreement. He claims essentally that his plea should be strickent to afford him the opportunity to prove that there was a breach of the agreement.

The appeal is frivolous. A plea of guilty may be stricken before sentencing only for "any fair and just reason." F.R. Crim. P. 32 (d). Gallo may not avail himself of any alleged breach of a plea agreement with his co-defendant. The right to assert such a breach is hers, not his. Manifestly, his adverse reaction to the sentence imposed on her does not constitute a fair and just reason to disturb his plea.

UNITED STATES COURT OF APPEALS
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Before WINTER, Chief Judge, SPROUSE, Circuit Judge, and MICHAEL, United States District Judge for the Western District of Virginia, sitting by Designation

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Decided: January 9, 1986

JUDGMENT AFFIRMED.